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**BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON**

<b>JACK AND CINDY DEATHERAGE,</b>	)	
	)	
<b>Appellants,</b>	)	<b>PCHB NO. 93-264</b>
	)	
<b>v.</b>	)	
	)	
<b>STATE OF WASHINGTON,</b>	)	<b>ORDER GRANTING</b>
<b>DEPARTMENT OF ECOLOGY,</b>	)	<b>SUMMARY JUDGMENT</b>
	)	<b>AND DISMISSING APPEAL</b>
	)	
<b>Respondent.</b>	)	
	)	

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This matter concerns a 1990 application by appellants, Jack and Cindy Deatherage, for a right to appropriate public ground water. The Deatherage's applied for sufficient water for a single domestic supply and for irrigation of 14 acres from April 1 to October 31, of each year. Respondent, State of Washington, Department of Ecology, granted the application subject to probable seasonal limitations from August through April. Ecology also determined that the Deatherage property does not appear to have any other water rights.

Appellants, the Deatherages, appeal the Ecology determination that their property does not have any other water rights, claiming a right with priority of 1898. Alternatively, the Deatherages urge that the 1990 application be granted with a priority date of 1898.

We hold that there are no genuine issues of material fact, that the matter can be decided as a matter of law and that there is no showing of entitlement to a right with priority of 1898.

**ORDER GRANTING SUMMARY JUDGMENT  
AND DISMISSING APPEAL**  
PCHB No. 93-264

1 Moreover, Ecology was correct in granting a permit with 1990 priority. This matter should  
2  
3 therefore be dismissed.

4 Having considered:

- 5 1. Motion for Summary Judgment, filed by Department of Ecology on April 1,  
6 1994, together with Memorandum, affidavit and other attachments.
- 7 2. Letter dated April 21, 1994, and filed April 25, 1994, written by Jack and  
8 Cindy Deatherage together with attachments.

9 together with the records and file herein, and being fully advised, the following is hereby  
10 entered:

12 I

3 There are no genuine issues of material fact.

14 II

15 The groundwater application made by appellants to Ecology was dated October 31,  
16 1990.

17  
18 *The right acquired by appropriation shall relate back to the*  
19 *date of filing of the original application with the Department.*  
RCW 90.03.340. See RCW 90.44.060.

20 Under the foregoing, the Deatherages' permit granted by Ecology pursuant to  
21 the 1990 application must bear the priority date of 1990.  
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III

In the course of its investigation of appellant's 1990 application, Ecology must tentatively determine the existence of water rights and availability of water. Rettkowski v. Department of Ecology, 122 Wn.2d 219, 228 reconsideration granted (1993). Here, Ecology was correct in investigating whether the site applied for might have water rights already. This is done to avoid issuance of a duplicative right. Ecology's determination was that the site applied for had no water rights. Because Ecology made that determination, the same is appealable here as part and parcel of the permit action. See RCW 43.21B.310.

IV

Appellants have evidence that their predecessors in title may have had a water right as early as 1898. This evidence consists of deeds and recordings in the County Auditor's office. Each of these precede the Water Code of 1917, Chap. 90.03 RCW.

V

The evidence of a pre-1917 water right which is acceptable in law is limited, however, by this legislative enactment:

*All persons using or claiming the right to withdraw or divert to make beneficial use of public surface or groundwaters of the state, except as hereinafter provided in this section, shall file with the Department of Ecology, not later than June 30, 1974, a statement of claim for each water right asserted on a form provided by the Department. This section shall not apply to any water rights which are based on a permit or certificate issued by the Department of Ecology or one of its predecessors.*  
RCW 90.14.041 (Emphasis added.)

1 In this case appellants have shown no statement of claim. Failure to file a claim operates as a  
2 conclusive waiver and relinquishment of any water rights that may have been held by the  
3 affected person. RCW 90.14.071, Ecology v. Adsit, 103 Wn.2d 698, 694 P.2d 1065 (1985).  
4

5 VI

6 Appellants urge that the failure to file a claim can be excused for two reasons. The  
7 first concerns the tragic hardship of their predecessors in title during the early 1970's, the  
8 second concerns information concerning claims published by Ecology. Neither is an excuse  
9 for failure to file a claim.  
10

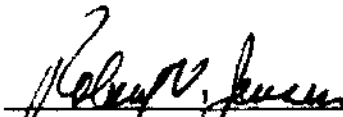
11 While appellants' predecessor in the early 70's suffered tragedies, culminating in his  
12 accidental death in 1976, filing could yet have been achieved. If not by that person at that  
13 time, then under extensions of the claim filing period which the legislature provided until  
14 September 1, 1985. RCW 90.14.043. Finally, while Ecology's informational brochure  
15 published at the time may be ambiguous, it has not been shown by clear, cogent and  
16 convincing evidence that appellants' predecessor actually relied upon it in failing to file a claim  
17 during his ownership. Absent such proof, Ecology cannot be estopped from citing the claim  
18 filing requirements of chapter 90.14 RCW. See Kramarevsky v. DSHS, 64 Wn. App. 14, 822  
19 P.2d 1227 (1992).  
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2 **WHEREFORE IT IS ORDERED** that:

- 3 1. Summary judgment is granted to respondent, Ecology.  
4 2. The permit with 1990 priority, is affirmed.  
5 3. There being no claims filed pursuant chapter 90.14 RCW for any other water  
6 right, this appeal is dismissed.

7 DONE this 11th day of May, 1994.  
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9

10 **POLLUTION CONTROL HEARINGS BOARD**

11   
12 ROBERT V. JENSEN, Chairman

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14 RICHARD C. KELLEY, Member

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16 JAMES A. TUPPER, JR., Member  
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